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No. 593

In the Supreme Court of the United States

October Term, 1946

The United States, Petitioner

v.

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On writ of certiorari to the [illegible]

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 393

THE UNITED STATES, PETITIONER

v.

ARTHUR PELZER

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 11-16) is reported in 31 F. Supp. 770.

JURISDICTION

The judgment of the court below was entered June 3, 1940 (R. 16-17). The petition for a writ of certiorari was filed September 3, 1940 (R. 17), and was granted October 21, 1940. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether under Section 504 (b) of the Revenue Act of 1932 the donor of a gift in trust is entitled to one $5,000 exclusion for the entire trust or to a separate $5,000 exclusion for each of the beneficiaries of the trust.

2. If the number of exclusions is to be determined by the number of beneficiaries, whether certain gifts in trust were of "future interests in property" for which no exclusions are allowable under Section 504 (b).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Acts of 1932 and 1938 and of the treasury regulations promulgated thereunder are set out in the Appendix.

STATEMENT

The special findings of fact of the Court of Claims (R. 4–11) may be summarized as follows:

On July 14, 1932, the taxpayer created a trust, hereafter referred to as the 1932 trust, for the benefit of his then living grandchildren (eight in number being specifically named in the trust instrument) and any other grandchildren that might thereafter be born during the life of the trust. The trust instrument provided that for a period of ten years from the date of its execution the net income from the trust estate should be accumulated and invested and reinvested; that upon the expiration

of the ten-year period the trustee should thereafter pay an "equal grandchild's distributive share" of the income to each of the grandchildren named in the trust who were then living and twenty-one years of age or over, such payments to continue to each during his life; that as and when each of the remaining grandchildren named in the trust reached twenty-one years of age the trustee should thereafter pay to him for and during his life "an equal grandchild's distributive share" of the income; but that during the respective minorities of the grandchildren named in the trust all net income not required to be paid out by the terms of the trust to adult named grandchildren or to grandchildren born subsequent to the execution of the trust instrument should be accumulated. The trust instrument also provided that any other grandchildren born during the life of the trust should participate therein on the same basis as the eight named grandchildren, except as to distributions of income made prior to the birth of the thereafter born grandchildren, and except that the thereafter born grandchildren should be paid their shares of the income during their respective minorities after the initial ten-year accumulation period. The trust instrument further provided that the distributive share of the net income of any deceased grandchild was to go to his issue *per stirpes,* if any, and, in the absence of such issue, to his surviving brother and/or sister, if any, and, if none, then to the other

grandchildren *per stirpes,* subject in any event to the terms of the trust. Finally, the trust instrument provided that the trust should continue and the income therefrom be distributed as provided until twenty-one years after the death of the last survivor of the eight named living grandchildren, at which time the trust should cease and the corpus should be divided among any then living grandchildren and the issue of all deceased grandchildren, the issue of a deceased grandchild to receive the deceased parent's share, *per stirpes* (R. 4–6).

On December 28, 1934, the taxpayer created a second trust, hereafter referred to as the 1934 trust, for the benefit of his wife and three daughters. The trust instrument provided that the income of this trust should be paid to the four beneficiaries in equal proportions, that upon the death of the wife, her share of the income should be divided equally among all of the taxpayer's grandchildren; that upon the death of any of the daughters, her share of the income should go to her children in equal shares, and that on the death of any grandchild leaving issue such grandchild's share should go to such issue, and if no issue to such grandchild's heirs at law. The trust instrument further provided that on reaching the age of twenty-two, each grandchild should receive free of the trust his share of his grandmother's (i. e. the taxpayer's wife's) portion of the corpus, if the grandmother was then deceased, or upon her decease thereafter,

and his share of his mother's portion, if his mother was then deceased, or upon her decease thereafter. In the event of the death of a daughter leaving no issue, the trust instrument provided that her share of the corpus should go to her heirs at law. (R. 7–8.)

During the years 1932, 1933, 1934, and 1935 the taxpayer made gifts to the first, or 1932, trust. During the year 1934 the taxpayer made gifts to the second, or 1934, trust and other gifts directly to his three daughters who were beneficiaries of the 1934 trust. (R. 6–9.)

The taxpayer duly filed gift tax returns for the years 1932, 1933, 1934, and 1935. No question of tax liability for the year 1932 was or is presented, since the total net gifts in that year were less than the $50,000 specific exemption. The Commissioner of Internal Revenue found a deficiency and assessed an additional tax for the year 1933 which was duly paid. He accepted as correct the returns filed for the years 1934 and 1935. During this period the Commissioner evidently was proceeding on the theory, in which the taxpayer concurred, that the beneficiaries of the trusts were the "persons" to whom the gifts were made, with the results that four exclusions were allowable annually from gifts to the 1934 trust, but that no exclusions were allowable from gifts to the 1932 trust, because the beneficiaries of that trust took only future interests. (R. 6–9.)

Thereafter, in July 1937, the taxpayer filed claims for refund for the years 1933, 1934, and 1935, based upon the theory that he was entitled to eight $5,000 exclusions annually from gifts to the 1932 trust, to four exclusions from gifts in 1934 to the 1934 trust, and to three exclusions from gifts made in 1934 directly to beneficiaries of the 1934 trust. (R. 2–4, 9–10.) These claims were allowed in part by the Commissioner. Operating on the theory that the trusts were the "persons" to whom the gifts were made, he allowed one $5,000 exclusion annually from gifts to the 1932 trust and one $5,000 exclusion from gifts to the 1934 trust, as well as three exclusions from gifts made directly to the beneficiaries of the 1934 trust. (R. 8–11.) In his certificates of overassessment the Commissioner explained that the gifts to the 1932 trust were, insofar as the beneficiaries were concerned, of future interests from which no exclusions were allowable. (R. 9–11.)

In the court below the Government contended (1) that the trusts and not the beneficiaries were the donees of the gifts, with the result that only one exclusion was allowable annually from gifts to each trust, but that (2) if the beneficiaries were to be regarded as the donees, then the beneficiaries of the 1932 trust received future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, from which no exclusions were allowable. The Court of Claims held (1) that the gifts in trust

were of present interests, and (2) that each beneficiary named in the respective trust instruments is a donee within the provisions of Section 504 (b), for each of whom the taxpayer is entitled to an exclusion of $5,000 in the computation of the net amount of gifts subject to tax. (R. 16.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that under Section 504 (b) of the Revenue Act of 1932 the taxpayer is entitled to a separate $5,000 exclusion for each of the beneficiaries of the trusts.

2. In holding that the gifts in trust under the 1932 trust were gifts of present interests in the property transferred.

3. In entering judgment against the United States and in failing to enter judgment for the United States and to dismiss the petition.

SUMMARY OF ARGUMENT

I. Section 504 (b) of the Revenue Act of 1932 excludes from the gift tax the first $5,000 of gifts, other than of future interests in property, "made to any person" by the donor during the year. Under this provision the donor of gifts in trust may take only one $5,000 exclusion from gifts to a single trust, regardless of the number of the beneficiaries of the trust, for the trust is the "person" to which the gifts are made. Section 1111 (a) (1) defines "person" as including "a trust"; a trust

is regularly treated for tax purposes as an entity composed of but distinct from the trustee and the beneficiaries; and a gift in trust is technically made to the trust entity. Further, the rule that under Section 504 (b) the trust is the donee of gifts in trust, and not the beneficiaries, is administratively expedient. It avoids, in the case of gifts in trust, the necessity which would otherwise exist of determining the number and identity of the beneficiaries and the nature and value of their separate interests in each gift. These determinations would frequently be difficult, and that as to value virtually impossible.

II. Gifts "of future interests in property" are excepted from the $5,000 exclusion from the gift tax provided by Section 504 (b). If, as we contend, the trust is the "person" to which a gift in trust is given, there arises no question whether the gifts in this case were of future interests, for the trusts, as entities, took present interests. But if that contention is rejected, and the beneficiaries are held to be the donees, we contend that the beneficiaries of the 1932 trust received only future interests in the gifts to that trust. Under the 1932 trust instrument the income was to be accumulated for ten years, and then was to be paid over in equal shares to the donor's grandchildren or to designated representatives of deceased grandchildren. The reports of the congressional committees state that "future interests in property" in Section 504 (b)

refers to any interest "limited to commence in possession or enjoyment at a future date." The Treasury regulations, tacitly approved by Congress by reenactment of the statute, use substantially the same language. Here there can be no doubt that the interests of the beneficiaries were not to commence in possession or enjoyment until at least ten years after the creation of the trust. Further, the committee reports state that by excepting gifts of future interests from the exclusion they sought to avoid the "apprehended difficulty * * * of determining the number of eventual donees and the values of their respective gifts." These determinations can be avoided in this case, and as to all gifts in trust, by considering the trust as the donee, as urged in point I. But Congress, by excepting from the exclusion gifts of future interests, intended to eliminate these questions as to direct gifts too. Various lower court decisions, while not as clearly involving future interests as does the case at bar, fail to give proper effect to this plainly expressed intent of Congress.

ARGUMENT

Introductory; administrative construction, lower court decisions.—Section 501 of the Revenue Act of 1932 imposes a tax on the transfer of property by gift. Section 502 prescribes the method for computing the gift tax at enumerated rates "on the aggregate sum of the net gifts." Section 504 (a)

defines "net gifts" as the total amount of gifts made during the calendar year, less certain deductions. Finally Section 504 (b), with which we are here concerned, provides that—

> In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

Section 504 (b) thus excludes from the gift tax the first $5,000 of gifts "made to any person" by the donor during the year, except that this exclusion does not apply to gifts "of future interests in property." In the present case the taxpayer made transfers of property in trust, the income therefrom to be paid to his grandchildren after an initial accumulation period of ten years. This and similar gifts in trust raise two questions under Section 504 (b). The first is whether the donor is entitled to one $5,000 exclusion for the entire trust, or to a separate $5,000 exclusion for each of the beneficiaries of the trust. More accurately, whether the donor may exclude only the first $5,000 of gifts to the trust, or whether he may treat the gifts as made to the beneficiaries, and exclude $5,000 from the gifts to each beneficiary. This turns on whether for purposes of Section 504 (b) the "person" to whom the gift is made is the trust as a separate legal entity or the beneficiaries. The second question

raised is whether the gifts are of "future interests in property," from which no exclusions are allowed by Section 504 (b).

These two questions are interconnected, and have been so treated by the administrative officers and the lower Federal courts. If under Section 504 (b) the "person" to whom the gift is made is the trust and not the beneficiaries, so that only one $5,000 exclusion is allowable, the gift is of a present and not of a future interest, for the trust receives a present interest. If, on the other hand, the beneficiaries are to be treated as the donees for the purpose of determining the number of exclusions allowable, then it is the characters of their interests which determine whether or to what extent the gift was of a present or of a future interest. Here, for example, the grandchildren, as beneficiaries of the 1932 trust, were to receive no payments for at least ten years; if they are to be regarded as the donees we think that the gifts to them were of future interests and that, therefore, the taxpayer was entitled to no exclusions from those gifts. The court below, however, not only held that the beneficiaries were the donees for determining the number of exclusions but that they received present and not future interests. We contest both points here, the first primarily, the second alternatively if the first be determined against us.

In administering the gift tax the Treasury proceeded for some years on the assumption that

under Section 504 (b) the beneficiaries of a gift in trust were to be considered as the donees, rather than the trust as a separate entity. Under this practice an exclusion of $5,000 was allowed for each beneficiary from gifts of present interests in property. As a corollary, the Treasury took the position during this period that whether a gift in trust was of a present or of a future interest was determinable by the character of the interest of the beneficiaries. This construction of the act was not lucidly articulated in the regulations, but it plainly was tacitly assumed therein. See Regulations 79, 1933 edition, Article 11, paragraph 2; 1936 edition, Article 21, both set out in the Appendix, *infra*. In the present case the initial administrative view that the beneficiaries of a gift in trust were the donees, and that the character of their interest was to be looked to to determine whether the gift was of a future interest, was reflected in the Commissioner's first audits of the taxpayers' returns for 1933, 1934, and 1935. Thus he allowed one $5,000 exclusion for each of the beneficiaries of the 1934 trust, but refused to allow any exclusion from gifts to the 1932 trust, unquestionably on the theory that the gifts to the beneficiaries of the 1932 trust were of future interests. (See R. 6–9.)

In 1938, however, the Bureau altered its construction of Section 504 (b) as a result of the decisions in *Wells* v. *Commissioner*, 34 B. T. A. 315

(1936), affirmed *sub nom. Commissioner* v. *Wells,* 88 F. (2d) 339 (C. C. A. 7th, 1937); *Commissioner* v. *Krebs,* 90 F. (2d) 880 (C. C. A. 3d) (1937); and *Knox* v. *Commissioner,* 36 B. T. A. 630 (1937). In the *Wells* case the taxpayer created three trusts, one for each of his children, the trust instruments providing that the income should be accumulated for a certain period and thereafter be distributed to the beneficiaries. The Commissioner refused to allow exclusions from gifts to these trusts on the ground that the gifts were of future interests. The Board held for the taxpayer. 34 B. T. A. 315. As an alternate ground of decision, it said that "the character of the interest that the donee takes" (p. 317) was decisive of whether the gift was of a future interest, that the trusts as entities might properly be regarded as the donees, and that the trusts took present interests in the property. On appeal by the Commissioner, the Circuit Court of Appeals for the Seventh Circuit affirmed, upon the theory that the trusts, which took present interests, were the donees, rather than the ultimate beneficiaries. 88 F. (2d) 339. Agreement with this view was expressed by the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Krebs,* 90 F. (2d) 880 (1937); see also *Noyes* v. *Hassett,* 20 F. Supp. 31 (D. Mass., 1937).

In the *Wells* case there were as many trusts as beneficiaries, and hence no question was presented as to the number of $5,000 exclusions. The theory

adopted there and in the *Krebs* case, that the trusts were the donees, required, however, as a matter of logical consistency, that the number of exclusions be determined by the number of trusts rather than by the number of beneficiaries. In the *Krebs* case, indeed, one $5,000 exclusion was allowed from gifts to each of six trusts having but three beneficiaries altogether, although it is not clear to what extent this feature of the case was considered by the court. At any rate, in the *Knox* case (36 B. T. A. 630, 633), the Board of Tax Appeals held, on the authority of the *Wells* and *Krebs* cases, that the number of exclusions was to be determined by the number of trusts rather than by the number of beneficiaries, where the latter outnumbered the former.

Thereupon, in 1938, the Bureau changed its construction of the act and acquiesced in these decisions. It withdrew its prior nonacquiescence in the decision of the Board in the *Wells* case (Cum. Bull. XV–1, p. 48 (1936)), and acquiesced in that decision (Cum. Bull. 1938–1, p. 32) [1] and in the decision of the Board in the *Knox* case (Cum. Bull. 1938–1, p. 17). And it published the decisions of the circuit courts of appeals in the *Wells* and *Krebs* cases. Ct. D. 1310, Cum. Bull. 1938–1, p.

[1] The issue of the cumulative bulletin containing the acquiescence and withdrawal of prior nonacquiescence in the *Wells* decision repeats elsewhere the nonacquiescence in that decision. Cum. Bull. 1938–1, p. 60. Undoubtedly this repetition was an oversight.

516, and Ct. D. 1311, Cum. Bull. 1938–1, p. 518.[2] This metamorphosis in the administrative construction is also reflected in this case. The taxpayer filed claims for refunds, and in auditing them the Commissioner, altering his prior practice, allowed a $5,000 exclusion annually from gifts to the 1932 trust, although he expressed continued adherence to the view that the gifts, so far as the beneficiaries were concerned, were of future interests. (R. 9–10.) This changed construction resulted in substantial refunds to the taxpayer here (R. 9, 10, 11); undoubtedly innumerable refunds were made and innumerable exclusions allowed in other similar cases.

Moreover, this construction of the Act, that the trust entity is the donee of a gift in trust and not the beneficiaries, enabled donors to avoid gift taxes by creating a number of trusts for one person and claiming an exclusion for each trust. See *Cox* v. *Commissioner,* 38 B. T. A. 865

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[2] Although the Bureau thus published its acquiescence in the *Wells* and *Knox* decisions, and actually altered its former practice, it never issued any ruling explaining the change, and the Treasury regulations tacitly embodying the earlier view were never repudiated or amended retroactively. In 1938, however, the regulations were amended to conform them to the 1938 amendments of the gift-tax provisions of the 1932 Act. See T. D. 4830, Cum. Bull. 1938–2, p. 368. And in this amendment the provisions of the regulations reflecting the earlier view, that the beneficiaries are the donees of gifts in trust, were omitted. Compare sentence 1 of Article 21 of Regulations 79, 1936 edition, with sentence 1 of Article 21 of Regulations 79, 1936 edition as amended in 1938, both set out in the Appendix, *infra*, pp. 45–47.

(1938); *McBrier* v. *Commissioner*, 108 F. (2d) 967, 968, 969 (C. C. A. 3d). To shut this loophole Section 504 (b) of the 1932 Act was amended by Section 505 of the Revenue Act of 1938 (set out *infra* p. 41) to allow no exclusion at all from gifts in trust.[3] This amendment was prospective only; it applies only to 1939 and subsequent years.

Thereafter, however, when the Commissioner sought, in turn, to invoke the construction that the trust is the donee, for the purpose of determining the number of exclusions, many of the lower federal courts, and eventually the Board of Tax Appeals, repudiated the *Wells, Krebs,* and *Knox* decisions and held that the taxpayers were entitled to as many exclusions as there were beneficiaries receiving present interests. *Welch* v. *Davidson,* 102

[3] The Senate Finance Committee, with which the amendment originated, stated (S. Rep. No. 1567, 75th Cong., 3d Sess., p. 41):

"The committee is also proposing an amendment by which the exclusion would not apply to gifts in trust. The Board of Tax Appeals and several of the Federal courts have held, with respect to gifts in trust, that the trust entities were the donees and on that account the gifts were of present and not of future interests. The statute, as thus construed, affords ready means of tax avoidance, since a donor may create any number of trusts in the same year in favor of the same beneficiary with a $5,000 exclusion applying to each trust, whereas the gifts, if made otherwise than in trust, would in no case be subject to more than a single exclusion of $5,000. The proposed change does not reduce the $40,000 specific exemption for gifts. The amendment will apply only when computing the tax for the calendar year 1939 and succeeding calendar years."

F. (2d) 100 (C. C. A. 1st); *Rheinstrom* v. *Commissioner*, 105 F. (2d) 642 (C. C. A. 8th); *Robertson* v. *Nee*, 105 F. (2d) 651 (C. C. A. 8th); *McBrier* v. *Commissioner*, 108 F. (2d) 967 (C. C. A. 3d); *Hutchings* v. *Commissioner*, 111 F. (2d) 229 (C. C. A. 5th), certiorari granted, No. 419 this Term, to be argued herewith; *Early* v. *Reid* (C. C. A. 4th), decided August 7, 1940, not yet reported but found in 1940 C. C. H., Vol. 4, par. 9634, pending on petition for certiorari No. 556, this Term; *Rubinstein* v. *Commissioner*, 41 B. T. A. 220.[4] The Seventh Circuit alone adhered to the earlier view. In *United States* v. *Ryerson*, 114 F. (2d) 150, certiorari granted, No. 495 this Term, to be argued herewith, it held that the trust was the donee for the purpose of determining the number of exclusions. This, it said, was the plain implication of its reasoning in the *Wells* case. See 114 F. (2d) at 155.

Although these holdings that the beneficiaries were the donees for the purpose of determining the number of exclusions made necessary the conclusion that it was the interest received by the beneficiary which determined whether the gift was of a future interest, the same courts, as shown in detail in point II hereof, gave to the term "future inter-

[4] In the *McBrier* case the Third Circuit distinguished its earlier decision in the *Krebs* case as *dicta*. In the *Rubinstein* case the Board of Tax Appeals specifically overruled its earlier decisions.

est" a very narrow construction, and held for the taxpayer without exception.

The final result of the court decisions is well stated by Judge Woodrough, dissenting in *Rheinstrom* v. *Commissioner,* 105 F. (2d) 642, 648 (C. C. A. 8th):

> It seems to me that the gift tax exemption clause, 26 U. S. C. A. § 553, has been learnedly interpreted too much. The interpretations are in diametrical conflict, but join in defeating the tax assessor. * * *

The primary position of the Government in this case is that only one exclusion of $5,000 is allowable annually from gifts to any one trust, regardless of the number of beneficiaries of the trust. If this contention is rejected, whether the gifts are of future interests must be determined by the nature of the interests bestowed on the beneficiaries, and, as a secondary defense, we think it quite clear that the beneficiaries of the 1932 trust received future interests as that term is used in the statute.

I

ONLY ONE EXCLUSION IS ALLOWABLE ANNUALLY UNDER SECTION 504 (b) OF THE REVENUE ACT OF 1932 FROM GIFTS TO ANY ONE TRUST

Section 504 (b) of the Revenue Act of 1932 excludes from the gift tax the first $5,000 of gifts (other than of future interests) made to any "person" by the donor during the calendar year. Sec-

tion 1111 (a) (1) defines the term "person" as meaning "an individual, a trust or estate, a partnership, or a corporation." Indeed, a trust is customarily regarded as a separate entity comprised of, but distinct from, the trustee and the beneficiaries, and is regularly so treated for tax purposes. And a gift in trust is of course technically made to the trust. Viewing the question from the standpoint of the literal wording of the Act, our position that the trust is the "person" to whom the gift is made, is, therefore, entirely sound.[5] See *Commis-*

[5] The committee reports might be thought to show that the committees regarded the *cestui qui trust* as the donee of a gift in trust. In their exposition of Section 501, which imposed the tax, both the committee reports state (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 27-28; S. Rep. No. 665, 72d Cong., 1st Sess., pp. 39-40):

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions (subject to certain express conditions and limitations) whereby, and to the extent (sec. 503) that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, (1) a transfer of property by a corporation without a consideration, or one less than adequate and fully in money or money's worth, to B would constitute a gift from the stockholders of the corporation to B; (2) a transfer by A to a corporation owned by his children would constitute a gift to the children; (3) a transfer of property to B where there is imposed upon B the obligation of paying a commensurate annuity to C would be a gift to C; (4) the payment of money or the transfer of property to B in consideration whereof he is to render a service to C would constitute a gift to C or gifts both to B and to C depending on whether the service to be rendered by B to C was or was not an adequate and full

sioner v. *Wells*, 88 F. (2d) 339, 340–341 (C. C. A. 7th); *United States* v. *Ryerson*, 114 F. (2d) 150, 154–155 (C. C. A. 7th), certiorari granted, No. 495, this Term, to be argued herewith; *Commissioner* v. *Krebs*, 90 F. (2d) 880 (C. C. A. 3d).[6]

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consideration in money or money's worth for that which was received by B; (5) the forgiveness or payment by A of B's indebtedness would constitute a gift to B; (6) where A creates a joint bank account for himself and B, there would be a gift to B when he draws upon the account for his own benefit to the extent of the amount drawn out; (7) where A creates a revocable trust naming B as beneficiary, a gift to B of the corpus is effected when A relinquishes the power to revoke or the power is otherwise terminated in B's favor (the income payments to B in the interim being gifts from A in the calendar years when received)."

It is plain from the quoted language itself, however, that the reports were concerned with the possibility of evasion of the gift tax, and were not considering whether in the case of gifts in trust the trusts or the beneficiaries were the donees for the purpose of determining the number of exclusions under Section 504 (b).

[6] The leading case to the contrary is *Welch* v. *Davidson*, 102 F. (2d) 100 (C. C. A. 1st). As pointed out by Judge Sibley in a concurring opinion in *Hutchings* v. *Commissioner*, 111 F. (2d) 229, 231, the *Davidson* case "rejected the idea that the trust was the donee, and by confusing the trust with the trustee, (who of course takes title only and no beneficial interest), asserted that the beneficiaries are always the donees." The *Davidson* case was thereafter followed in the other cases, *supra*.

Judge Sibley was of the view that the donor's intention should be controlling as to whether the trust or the beneficiary is the donee. He said (111 F. (2d) at 231):

"If it appears that some enterprise or charity or impersonal purpose, or even remote and unascertained first beneficiaries, furnished the motive for the gift in trust, it should be esteemed a single gift to the trust. If on the other hand

The position that the trust should be considered as the "person" or donee for the purpose of determining the number of exclusions is also the more practicable rule administratively, since it avoids the necessity of determining the number and identity of the beneficiaries and the nature or value of their separate interests in each gift. How difficult such determinations frequently are is well illustrated by the present case. The trust instrument creating the 1932 trust provided that for a period of ten years from its date of execution the income should be accumulated, and that at the expiration of the ten-year period the trustee should pay an equal *pro rata* share of the income to each of the grandchildren who were then living and twenty-one years of age, and that as each grandchild reached twenty-one years of age thereafter the trustee should pay his share of the income to him (R. 5). The trust instrument further provided that grandchildren born subsequent to its execution but during the life of the trust (i. e. until twenty-one years after the death of the last survivor of the grandchildren living at the creation of the trust) should be entitled to participate in the trust estate equally with the other grandchildren (R. 5–6).

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the first beneficiaries are ascertained individuals whom the donor wished to help, and used the trust only as a devise to convey or preserve the gift or control its ultimate devolution, the gift is to these persons, anl not to the trust, and there are as many gifts as there are first beneficiaries. * * *"

Finally, the trust prescribed the disposition of the income shares of grandchildren dying during the life of the trust and the distribution of the corpus upon its termination (R. 6).

Under such a trust instrument, there is some difficulty, in the first place, in determining the number and identity of the donees, if the beneficiaries and not the trust are to be considered as the donees. Here the taxpayer claimed and the court below allowed an exclusion for each of the eight grandchildren who were living when the trust was created and who were named in the trust instrument. Whether all eight of them were living at the times of all of the gifts, or whether any additional grandchild or grandchildren had been born, does not appear. Presumably, on the taxpayer's theory, only those grandchildren who were living at some particular date or dates are to be considered as donees for determining the number of exclusions. The decisive date might be that of each gift to the trust, although under the trust instrument grandchildren born after a gift has been made are equal beneficiaries of the trust with those born before. Or perhaps the decisive date might be that on which the donor filed his return, or on which the tax liability was finally settled. Whatever the date might be, no showing was made here as to how many grandchildren were alive on any date.

Far more difficult is the task of determining the value of the separate interest of each beneficiary

in each gift. The taxpayer apparently assumes that each gift in trust has the same value to the beneficiaries as if transferred outright, and that this value is to be allocated equally among the eight named grandchildren. Neither assumption is warranted. It is doubtless true from the standpoint of the trust as donee that a gift in trust has the same value as if transferred outright. But that is not true from the standpoint of the beneficiaries, for the reason, among others, that a dollar in hand is worth more than a dollar payable next year. And if the beneficiaries are the donees for determining the number of exclusions, presumably it is the value of the gifts to the beneficiaries which measures the amounts of the exclusions. It is the first \$5,000 of gifts made during the year to any person that is excluded from the gift tax by Section 504 (b), and before \$5,000 may be excluded for each beneficiary it becomes necessary to establish that each beneficiary has received a gift of that value to him. And if the beneficiaries are considered the donees, it becomes necessary in any event to value each beneficiary's interest under Section 510, which makes the "donee of any gift" secondarily liable "to the extent of the value of such gift." For it is not to be supposed that the donee is made liable beyond the value of the gift to him.[7] Furthermore the eight named grand-

[7] In this connection it should be pointed out that the trust has the resources with which to discharge the tax liability while frequently, as here, the beneficiaries have not.

children were not the only beneficiaries of the gifts in trust. They received no interest in the corpus, which was not to be distributed until twenty-one years after the death of their last survivor, and their rights in the income were subject to defeasance by death and to proportionate diminution by the births of other grandchildren. Thus the gifts in trust were in part for the benefit of unascertainable persons; to that extent the combined interests of the eight named grandchildren fell short of equalling in value the property transferred, even aside from the lessening of the values of their interests by the postponement of their rights to receive income.

Hence there would have to be computed the value to each beneficiary of each gift at the time of the gift, taking into consideration the fact that receipt of the income by the beneficiaries is to be postponed for varying periods. But that is only the beginning of the inquiry. The value of each gift to each beneficiary depends, not only on how much time must elapse before he could receive income, but on how many other beneficiaries would precede him in the receipt of income. The mortality tables would have to be consulted, for the death of any grandchild would terminate his receipt of income, but would, if he died without issue, increase the income of the survivors. The interest of each grandchild would be diminished by the subsequent birth of other grandchildren.

To determine the value of each gift to each living grandchild it would therefore be necessary to compute the probabilities of the births of other grandchildren, including both the number and the dates of births—for the later they were born the less they would subtract from the income rights of grandchildren theretofore born.[8]

This problem of valuation may be approached from another angle, which likewise fortifies the conclusion that if the beneficiaries are the donees exclusions may not be taken on the basis of the face amounts of the gifts. We contend in part II hereof that unless the trust is the donee the gifts

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[8] In *Humes* v. *United States*, 276 U. S. 487, the court held that a deduction for a conditional charitable bequest was properly disallowed because the present value of the bequest could not be determined with approximate accuracy. The taxpayer's valuation involved, as would be necessary here, a combination and adjustment of standard mortality tables and not-so-standard marriage and fertility tables, the latter being based on the experience of Scotch peers. The Court, through Mr. Justice Brandeis, said (pp. 493–494):

"It was on such data that the petitioners sought to set a money value on the probability that this Texas girl of fifteen will not marry, or if she does, will die without issue before the age of thirty, or thirty-five, or forty. Obviously, the calculation that the contingent interest of the charities was equal to 4.0909 per cent of the residue, was mere speculation bearing the delusive appearance of accuracy.

"One may guess, or gamble on, or even insure against, any future event. The Solicitor General tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute."

to the 1932 trust were entirely of future interests. But aside from this contention it cannot be questioned that the gifts are in part gifts "of future interests in property" from which no exclusions may be taken. The interests in the corpus, which is to be distributed twenty-one years after the death of the last survivor of the grandchildren living at the creation of the trust, are future interests. So also there are future interests in the income, i. e., the interests of those possible recipients who were unidentifiable at the times of the gifts, such as after-born grandchildren or issue of grandchildren living at the times of the gifts but deceased thereafter. To the extent that the gifts are thus of future interests in property, exclusions may not be taken. *Gardner* v. *Commissioner*, 41 B. T. A. 679, 685.[9] And the value of these interests must on any theory be deducted from the value of the property transferred in determining the amounts of the exclusions.

[9] In that case the trust instrument provided that the income was to be paid to a single named beneficiary for life or for twenty-five years, whichever was shorter, and that after twenty-five years, if the beneficiary was still living, the trust corpus should be given to him. The Board held that the beneficiary's interest in the income was a present interest but that his interest in the corpus was a future interest, that the gifts to the trust were thus in part of a future interest, and that the exclusions were limited in amount to the present value of the beneficiary's right to receive income from the gifts.

In short, we submit that in the case of any trust of average complexity, such as that here, it is impossible to determine the present value to each beneficiary of gifts to the trust. Here the taxpayer has made no effort to show the value of each gift to each beneficiary; and plainly no reasonably accurate showing could be made. Certainly it may not be assumed, as the taxpayer apparently assumes, that each of the eight named grandchildren received in value one-eighth of each gift. Hence the taxpayer has wholly failed to show that each of the eight grandchildren—the named donees—received in the years in question gifts of a value of $5,000.

In addition to these obvious and abundant problems which are avoided by considering the trust as the person to whom the gifts are made, such a construction also eliminates in the case of all gifts in trust the question, discussed in part II hereof, whether the gifts are of present or of future interests. For, as held in the *Wells* and *Krebs* cases, if the trust is the donee, it takes a present interest.

It is true, as has already been stated (*supra* pp. 15–16), that this interpretation of Section 504 (b) makes it possible for a donor to avoid taxes by creating a number of trusts for one person and claiming an exclusion for each trust. However, this gap has now been closed by Section 505 of the Revenue Act of 1938, which amended Section 504 (b) of the 1932 Act to allow no exclusion at all for gifts

in trust. While this amendment applies only to 1939 and subsequent years, it is probable that an overturning of the Bureau's construction at this date would come too late to permit collection now of gift taxes for 1938 and the years before that.

II

THE GRANDCHILDREN RECEIVED FUTURE INTERESTS IN THE PROPERTY CONVEYED TO THE 1932 TRUST

Section 504 (b) excepts gifts "of future interests in property" from the $5,000 exclusion. If, as we contend, the trusts are the persons to whom the gifts are made, there arises no question whether the gifts were of future interests, for the trusts, as entities, took present interests. If, however, as the court below held, the beneficiaries are to be treated as the donees for the purpose of determining the number of exclusions allowable, then it is the character of their interests which determines whether the gift is a gift of a present or of a future interest. We submit that in the instant case the beneficiaries of the 1932 trust received only future interests in the gifts made to that trust, and that therefore no exclusions were allowable. We think it quite probable, although more doubtful, that the beneficiaries of the 1934 trust also took only future interests; that question, however, is academic, since the exclusions allowed below for those beneficiaries are supportable in any event by the direct gifts to them.

As has been pointed out, *supra* pp. 23–26, undoubtedly the gifts to the 1932 trust were in part of future interests; the only question is whether the rights of the eight named grandchildren to receive income from the gifts gave them present or future interests therein. We contend that they were future interests. The property was conveyed to trustees to accumulate the income therefrom for a period of ten years. During this time the beneficiaries were to receive nothing at all from the trust. They had no right to the present enjoyment of the income and unless they survived the ten-year period would never receive any part of the income. We do not believe that it is material whether the eight named grandchildren each had a vested interest in one-eighth of the income from the trust property subject to be totally divested by death or partially divested by the birth of other grandchildren or whether their interests were contingent ones. In either event they were to take effect in enjoyment only in the future and they were, therefore, "future interests" within the meaning of Section 504 (b).

The term "future interests" is, of course, a familiar one in the law of real property, and is frequently defined, expressly or by use, in treatises in that field. These definitions serve, however, only as generally descriptive or to demarcate a field of inquiry. See e. g. Restatement of Property, Vol. II, pp. 516–517. So far as this usage is relevant here,

it probably supports our contention.[10] Here, however, the real question is what Congress meant by the words "future interests in property" in Section 504 (b). Compare *Helvering* v. *Hallock,* 309 U. S. 106, 118. The report of the House Committee states (H. Rep. No. 708, 72d Cong., 1st Sess., p. 29):

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[10] Professors Burdick and Bigelow describe as a future "estate" or "use" a grant, before the statute of uses, of land "to B. for the use of C. to commence ten years hence." Burdick, Real Property (1914) § 150, p. 372; Bigelow, Cases on Property (1919), p. 79.

The Restatement of Property, Vol. II, § 153, in differentiating present and future interests, states:

"(3) A present interest is an interest in land, or in a thing other than land, which includes

"(a) either a right to the immediate beneficial enjoyment of the affected thing;

"(b) or, if the affected thing is the subject matter of a trust,

"(i) either the right to the immediate beneficial enjoyment of the proceeds of the trust;

"(ii) or the right of the trustee forthwith to have the control and management of the affected thing pursuant to the provisions of the trust."

The comment on this provision reads (p. 524):

"*i. Present and future interests when a trust exists.* The rule stated in Subsection (3) (a) is expressed in terms of a 'right to the immediate beneficial enjoyment of the affected thing.' The rule stated in Subsection (3) (b) does not use this phraseology. The reason for this difference is that the relations which exist between a trustee and his beneficiary make it inapt to speak of either the trustee or the beneficiary as having the 'beneficial enjoyment of the affected thing.' Consequently it is necessary, in such a situation, to recognize the co-existence of two different kinds of 'present interests,' namely the possible beneficiary's right to the im-

By subsection (b) a gift or gifts to any one person during the calendar year, if in the amount or of the value of $3,000 or less, is not to be accounted for in determining the total amount of gifts of that or any subsequent calendar year. Likewise, the first $3,000 of a gift to any one person exceeding that amount is not to be accounted for. Such exemption, on the one hand, is to obviate the necessity of keeping an account of and reporting numerous small gifts, and, on the other, to fix the amount sufficiently large to cover in most cases wedding and Christmas gifts and occasional gifts of relatively small amounts. The exemption does not apply with respect to a gift to any donee to whom is given a future interest. The

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mediate beneficial enjoyment of the proceeds of the trust [see Subsection (3) (b) (i)] and the trustee's right forthwith to have the control and management of the affected thing pursuant to the provisions of the trust. * * *"

Thus this analysis is approximately ours, viz, that the trust (or the trustee) received a present interest, so that an exclusion is allowable if it (or he) is viewed as the donee, but that the beneficiaries did not receive present interests because they did not reserve the "right to the immediate beneficial enjoyment of the proceeds of the trust," so that if they are viewed as the donees no exclusions are allowable.

Again, the interest of the beneficiaries here might be compared to "a postponed right to the enjoyment of an easement, profit, rent or similar interest in the land of another." Restatement of Property, Vol. II, § 153 (2). The Restatement recognizes that such interests are analytically "future interests," although for "pragmatic" reasons it excludes them from its definition of the term. See Restatement, Property, Vol. II, pp. 523, 516, 517.

> term "future interests in property" refers to any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date. The exemption being available only in so far as the donees are ascertainable, the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts.

The Senate Committee increased the exemption to $5,000; otherwise its report repeats the House Committee report quoted above. See S. Rep. No. 665, 72d Cong., 1st Sess., p. 41.

The committees thus described as a future interest any interest "limited to commence in possession or enjoyment at a future date." This definition of future interests is likewise found, in almost identical language, in the Treasury regulations. See Regulations 79, 1933 and 1936 editions, Article 11, set out *infra,* pp. 42, 44–45. These regulations have been in force ever since 1933. In 1938, as has already been seen, Section 504 (b) was amended to eliminate any exclusion from gifts in trust. But the phrase "future interests in property" was retained without amendment. Accordingly, under the familiar rule, the Treasury definition of that phrase was impliedly sanctioned by Congress.

In this case the interests of the beneficiaries of the 1932 trust were not to commence in possession or enjoyment until at least ten years after the creation of the trust. The eight named grandchildren were not to receive their respective shares of the income until that date, or until they were twenty-one, whichever was later. While all the income during the ten-year period, and the undistributed income thereafter, was to be added to the corpus of the trust, and in that way would increase the potential income share of each beneficiary, that income was nonetheless postponed in enjoyment to the beneficiaries. Any beneficiary who died before the date on which he was to receive income would never receive anything. Plainly these beneficiaries received nothing but future interests in the gifts, as that term was used by Congress.

The same result is reached when we look to the end which the committees said they sought to achieve, i. e., avoidance of the difficulty of determining "the number of eventual donees and the values of their respective gifts." How difficult, and as to value probably impossible, that would be in this case and in other similar cases, if the beneficiaries are to be considered the donees, is fully shown, *supra,* pp. 22–27. And it is precisely those problems which Congress sought to obviate. They can be avoided in this case, and in all cases of gifts in trusts, by considering the trust as the donee, as urged in point I of this Argument. But Congress

intended to eliminate these difficulties not alone in the case of gifts to trusts but with respect to direct gifts too, and it sought to do so by excepting gifts of future interests from the $5,000 exclusion.

The court below did not proffer a rationale of its holding that the grandchildren received present interests, but merely quoted and digested various other cases in which it had been held that the beneficiaries of the particular trusts there involved received present interests. See R. 13–16. Of the cases cited, in *Commissioner* v. *Wells,* 88 F. (2d) 339 (C. C. A. 7th), as already stated, the court held that since the trust was to be regarded as the donee the gift was not of a future interest, regardless of the nature of the interests of the beneficiaries. The court also so held in *Commissioner* v. *Krebs,* 90 F. (2d) 880 (C. C. A. 3d), but it went on to say that tested by the nature of the beneficiaries' interests, the gifts there involved were gifts of present interests. In the *Krebs* case, and in the remaining cases cited below (*Noyes* v. *Hassett,* 20 F. Supp. 31 (D. Mass.); *Rheinstrom* v. *Commissioner,* 105 F. (2d) 642 (C. C. A. 8th); *Welch* v. *Davidson,* 22 F. Supp. 726, affirmed on another ground, 102 F. (2d) 100 (C. C. A. 1st)), the trust instruments provided for the distribution of income to the beneficiaries commencing immediately, and for the eventual distribution, after some years, of the corpus. In some of these cases the beneficiaries had an absolute right to income, in others distribution

was left to the discretion of the trustees, but in all whatever right to income the beneficiaries had commenced at once and not at some future date. In this respect these cases are, therefore, distinguishable from the present.

We think, however, that these cases are wrongly decided, and that the correct view is that ably presented by Judge Woodrough in his dissenting opinion in *Rheinstrom* v. *Commissioner*, 105 F. (2d) 642 at 648–650. Judge Woodrough points out, what is well known, that the gift tax was enacted to supplement the estate tax.[11] From this he concludes that the purpose of Congress in excluding the first $5,000 of gifts to any one person other than of future interests in property was to differentiate between "current bounties" and gifts comparable in result to testamentary dispositions.

> Congress looked to the predominant characteristic of those gift transfers that do not work out like testamentary dispositions and which ought not to be taxed like inheritances. It observed that the distinguishing feature is that the donees get such gifts at the time they are made and for present enjoyment.

On the other hand—

> Transfers of property upon trusts that insure to the objects of a man's bounty nothing in the present but an interest in and in-

[11] See H. Rep. No. 708, 72d Cong., 1st Sess., pp. 28–29; S. Rep. No. 665, 72d Cong., 1st Sess., pp. 40–41; 75 Cong. Rec. 5691, 5788, 7239, 10084.

come from his property in the future or after the donor's death, work out results like testamentary provisions and descent laws. Congress wanted and had a right to exact tax on inheritances, and it wanted to and had the same power to exact the tax on transfers that accomplish effects similar to letters testamentary and descent laws. The salient and universal characteristic of the transfers that do accomplish such effects is the preservation of the interest in property to the object of the bounty into the future. Therefore, as to those transfers that do provide for the future interests, Congress plainly said that they should be taxed. The words it used to make an exception to the exemption, "other than future interests in property", seem to me to convey the true intent too plain for argument. The phrase is not of technical significance or used in law like "estates in futuro." It is a layman's expression that every man on the street knows of. Who does not know the difference between getting his property now and getting future interests in it tied up so that he can't get his hands on it till he's old?

The committee reports support this construction of the Act. The committee references to "numerous small gifts" and to "wedding and Christmas gifts and occasional gifts of relatively small amounts" show that they intended to exclude from the tax what Judge Woodrough calls "current bounties." Correlatively, the descriptions of fu-

ture interests as any interests "limited to commence in possession or enjoyment at a future date" and the statements that the denial of the exclusion in the case of gifts of future interests would avoid difficulties of determining "the number of eventual donees and the values of their respective gifts" show that Congress meant to tax in their entirety gifts looking to future earnings and corpus that may exist in the future. The utter fatuity of a contrary result is illustrated by the Board's decision in *Gardner* v. *Commissioner*, 41 B. T. A. 679, 685. There a single beneficiary was to receive the income for 25 years, and then the corpus, if he were still living. The Board held that the beneficiary had a present interest in the income, but a future interest in the corpus, and that the exclusion must be limited to the present value of the right to receive income from the gifts. Plainly it is artificial to hold that the beneficiary had a present interest in the income to be received in the twenty-fourth year, but a future interest in the corpus payable to him the twenty-fifth year. Realistically he had no present interest in either.

Finally, as Judge Woodrough also points out, this interpretation of the Act is necessary if, as Congress intended, the gift tax is "to discourage transfers for the purpose of avoiding the estate tax." (House Committee Report, p. 28, Senate Committee Report, p. 40.) Judge Woodrough said (105 F. (2d) at 650):

* * * But it was obvious to Congress that a living man can multiply his gift transfers to the limit of his estate. Manifestly, if Congress let him make $5,000 transfers of the kind that work out effects like testamentary dispositions without liability for tax, then all he had to do was to multiply and split his transfers and in that way effectively insure the future interests of his heirs presumptive without liability for any tax. Can it really be thought that such was the intent of Congress?

CONCLUSION

For the reasons stated we submit that the decision of the court below is erroneous and that it should be reversed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of —

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

GIFT TAX RATE SCHEDULE

(There follows a tax rate schedule, the rate being graduated upward according to the amount of the net gifts.)

* * * * *

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

* * * * *

SEC. 510. LIEN FOR TAX.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth. If the Commissioner is satisfied that the tax liability has been fully discharged or provided for, he

may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all of the property from the lien herein imposed:

SEC. 1111. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 505. COMPUTATION OF NET GIFTS.

(a) Section 504 (b) of the Revenue Act of 1932, relating to the computation of net gifts, is amended to read as follows:

"(b) *Gifts less than $4,000.*—In the case of gifts (other than gifts in trust or of future interests in property) made to any person by the donor during the calendar year, the first $4,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year."

(b) The amendment made by subsection (a) of this section shall be applied in computing the tax for the calendar year 1939 and each calendar year thereafter (but not the tax for the calendar year 1938 or a previous calendar year), but such amendment shall not be applied in any computations in respect of the calendar year 1938 and previous calendar years for the purpose of computing the tax for the calendar year 1939 or any calendar year thereafter.

Regulations 79, edition approved October 30, 1933. (Promulgated under the Revenue Act of 1932.):

ART. 10. *Total amount of gifts.*—The statute provides that in determining the total

amount of gifts during the calendar year the value of a gift or gifts (other than of a future interest in property) made to any one person is reduced by $5,000. For example, where the donor during a calendar year makes a gift to A of $5,000, a gift to B of $6,000, and two gifts to C of $3,000 each, the total amount of the donor's gifts during such year is $2,000. Gifts made during the calendar year to any one person of $5,000 or less should not be returned unless the gifts consisted of a future interest in property. Gifts of future interests in property are required to be included in the total gifts even though the amount of such gifts is $5,000 or less.

ART. 11. *Future interests in property.*—The gift of a future interest in property, regardless of the amount thereof, is to be included in determining the total amount of gifts made during any calendar year. A future interest in property is any interest or estate in property, whether vested or contingent, which is limited to commence in use, possession, or enjoyment at some future date or time. Gifts of such interests are taxable subject only to the deductions authorized by section 505. For the valuation of future interests, see article 19.

The following example will illustrate the manner of ascertaining the total amount of gifts and the amount of "net gifts" subject to tax: A resident donor gives $10,000 in cash to each of his two sons and conveys, without a valuable consideration, property of the value of $100,000 to a trustee who is to pay the income to the donor's wife during her lifetime and at her death deliver the property to his two daughters. There should be subtracted $5,000 from each of the $10,000 gifts to the sons, and $5,000 from the value of the life estate given to the wife, assuming

that the value of her estate equals or exceeds that amount. The interests of the daughters in the trust property being future interests, no such subtraction is to be made therefrom. The total amount of gifts is $105,000 ($120,000 – $15,000), from which is deductible the specific exemption of $50,000 authorized by section 505 (a) (1). (See article 12.) Assuming the entire $50,000 specific exemption is claimed, the amount of the net or taxable gifts is $55,000.

*   *   *   *   *

ART. 20. *Persons required to file return.*—Any individual who was a citizen or resident of the United States and who, within the calendar year 1932 or any calendar year thereafter, makes any transfer or transfers by gift (see article 2) exceeding $5,000 in value to any one person, shall file with the collector a return on Form 709. Any such individual is required to file a return if he makes any gift of a future interest in property regardess of its value. * * *

*   *   *   *   *

ART. 21. *Donees and trustees required to file notice of gifts.*—All donees and trustees (except such organizations, etc., referred to in section 505 and article 13) receiving gifts in any one calendar year in excess of $5,000, or gifts of a future interest in property regardless of the value, should file a notice of the receipt of such gifts on Form 710, copies of which may be obtained from the Commissioner, or from any United States collector of internal revenue, upon application. When a gift is made in trust notice thereof should be filed by either the beneficiary of the trust or the trustee, but in such case one notice only is required. * * *

*   *   *   *   *

Regulations 79, edition approved February 26, 1936. (Promulgated under the Revenue Act of 1932 as amended and supplemented by the Revenue Acts of 1935 and 1936).

ART. 10. *Total amount of gifts.*—In determining the amount of gifts during any calendar year, there is excluded (save in the case of a gift or gifts of a future interest or interests) the first $5,000 of any single gift or aggregate of gifts made during such year to any one donee. A gift or gifts made during a given calendar year to any one donee of $5,000, or less, should not be listed on the return, unless consisting of a future interest or interests, or unless consisting of a present interest or interests created out of the same property in which a future interest or interests has been given. Gifts of future interests in property are required to be included in the total amount of gifts for the year even though the value of such gifts is $5,000, or less, and if such interest exceeds $5,000 in value, no part of the value is excluded from the total amount of gifts for the year whether the gift or gifts be to a single donee or to a number of donees. For example, if the donor during the calendar year made a gift to A of $5,000 in money, a gift to B of $6,000 in money, and a gift to C of a future interest in property, such future interest being valued at $3,000, the total amount of gifts during such year, for the purposes of the tax, is $4,000.

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and

other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For the valuation of future interests, see subdivision (7) of article 19.

* * * * *

ART. 20. *Persons required to file return.*—Any individual resident or citizen of the United States who within that portion of the calendar year 1932 subsequent to June 6, 1932, or within any calendar year thereafter, made a transfer by gift to any one donee which exceeded $5,000 in value (or regardless of value if the gift was of a future interest) must file a gift tax return on Form 709. * * *

* * * * *

ART. 21. *Donees and trustees required to file notice of gifts.*—All donees and trustees (except such organizations, etc., referred to in section 505 and article 13) receiving property transferred by gift in any one calendar year, shall file a notice on Form 710, unless the value of the gift, or the aggregate value of all the gifts, to the donee or to any one of the beneficiaries of the trust is $5,000, or less, and the subject of the gift is not a future interest in property. Copies of this form may be obtained from any United States collector of internal revenue upon applica-

tion. When a gift is made in trust notice thereof should be filed by either the beneficiary of the trust or the trustee, but in such case one notice only is required. If property is transferred in trust and the donor retains a power over the property, the notice (which is for information purposes only) should be filed even though it is considered that such power constitutes a retention of beneficial dominion and control and that by reason thereof the transfer is not a gift within the meaning of the statute. * * *

Regulations 79, 1936 edition as amended July 18, 1938. T. D. 4830, Cum. Bull. 1938–2, p. 368. (Amendments to conform the regulations to the Revenue Act of 1938:)

Art. 10. *Total amount of gifts.*—Except with respect to any gift in trust or of a future interest in property, the first $4,000 of gifts made to any one donee during the calendar year 1939 or during any calendar year thereafter shall be excluded in determining the total amount of gifts for such calendar year. Except with respect to any gift of a future interest in property, the first $5,000 of gifts made to any one donee during the calendar year 1938 or during any calendar year prior thereto shall be excluded in determining the total amount of gifts for such calendar year. The entire value of any gift made by a transfer in trust after December 31, 1938, and the entire value of any gift of a future interest in property, must be included in the total amount of gifts for the calendar year in which such a gift is made.

* * * * *

Art. 20. Any individual resident or citizen of the United States who within the calendar year 1939, or within any calendar

year thereafter, makes a transfer or transfers by gift to any one donee of a value or total value of more than $4,000 (or regardless of value in the case of a gift in trust or of a future interest in property), must file a gift tax return for such year on Form 709. In the case of a transfer or transfers by gift to any one donee of a value or total value of more than $5,000 (or regardless of value if the gift was of a future interest in property), made by any individual resident or citizen of the United States during the portion of the calendar year 1932 subsequent to June 6, 1932, or during any calendar year thereafter prior to the calendar year 1939, the filing of a gift tax return on Form 709 by the donor for such year is required.

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ART. 21. An information return or notice on Form 710 must be filed by every donee or trustee (except in the case of a gift for a public, charitable, etc., purpose as described in article 13) to whom is transferred in any one calendar year property by gift for which, as set forth in article 20, the donor is required to file a gift tax return.

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